No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

The respondents created a public waste management system supported by the flow control laws at issue here, in response to public demand, prompted by a failed system of public and private waste management in the 1980's. The laws favor the public system and the citizens of the counties, but do not favor or disfavor any private entity on the basis of their location within or outside of the counties or the State of New York. This case will determine whether such an exercise of the police power is consistent with the Commerce Clause of the Constitution.

STATEMENT OF FACTS

The Oneida-Herkimer Solid Waste Management Authority (the "Authority") operates an integrated solid waste management system as a public monopoly in the Counties of Oneida and Herkimer, in the Mohawk River Valley, in New York. The system consists of three transfer stations, a recycling facility, a compost facility, a household hazardous waste facility, a stump grinding facility and, as of October 2006, a landfill for non-recyclable waste.[1] The objectives of the system are to foster waste reduction, maximize reuse and recycling of waste materials, reduce the toxicity of non-recyclable waste and safely dispose of non-recyclable waste, in accordance with New York State solid waste management policy and the region's Local Solid Waste Management Plan (the "Plan"). The Authority does not provide service for waste originating outside of the Counties. JA 121a-24a; N.Y. Pub. Auth. Law §2049-ee(7) (McKinney 2006).

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1. The Authority's long-planned solid waste landfill was completed and began receiving waste on October 24, 2006. The Authority's transport and disposal contract with Waste Management of New York, operative since 1998, will terminate on December 31, 2006.

OPERATION OF THE SYSTEM

The system provides disposal and recycling services, but does not provide waste collection service. Waste collection is provided by the region's constituent cities, towns and villages,[2] and by private sector waste haulers by arrangement with consumers and municipalities. The system operates as a monopoly because the flow control laws under challenge here require all haulers and generators in the Counties to deliver waste and recyclables left at curbside to the appropriate Authority facility. ("Generators" of waste are simply all of the citizens, businesses and institutions that produce it.)

The courts below found that the flow control laws are not protectionist, do not discriminate against interstate commerce and are even-handed regulation. It is not disputed that all haulers and generators of waste, whether based locally or outside of the counties or the state, are equally subject to the laws. All pay the same system charge for the disposal of non-recyclable waste, and all are permitted to deliver recyclables and household hazardous wastes free of charge. JA 282a-85a.

The local laws are not enforced beyond the borders of Oneida and Herkimer Counties. There was no evidence presented below that these laws interfere in any way with the regulatory systems of any other state, or any other county within New York State. From 1991 through 2006, the Authority arranged for the disposal of non-recyclable waste delivered to the Authority's transfer stations at landfills located in Pennsylvania (1991-97) and western New York (1998-2006). Contracts with these facilities were procured

2. The more densely populated areas of the Counties, including the cities of Utica, Rome and their surrounding suburbs, are served by municipal collection with public employees or private contractors. Persons in other communities are served by private haulers or self-haul to Authority facilities.

through public competitive bidding pursuant to standards established by the Authority. JA 358a-59a.

The courts below found that the Authority's bidding process was open to in-state and out-of-state bidders and did not discriminate against any bidder on the basis of its location in another state. Pet. App. 67a, 95a-6a. Because the laws require that all waste in the region be delivered to the Authority, all landfills other than the facility selected by the Authority are unable to receive Oneida-Herkimer waste. As of January 1, 2007, all non-recyclable non-hazardous waste in the Counties will be disposed of at the Authority's landfill in Oneida County.

The laws require the waste generators of the Counties to recycle, and direct that recyclable materials be separated at curbside and delivered to the Authority's recycling facility. The laws allow generators to make direct arrangements with buyers of recyclables, but if such arrangements are not made, the recyclables are to be placed at curbside and delivered to the Authority. *See* Oneida Local Law §2(d); Pet. App. 122a; Herkimer Local Law §2(c); Pet. App. 135a. At the recycling center, the Authority further sorts and separates the material into 37 different commodities which are marketed to buyers in interstate commerce. JA 123a, 420a-21a.

BACKGROUND

The public waste management system was created in response to public demand prompted by the collapse of traditional disposal methods in the 1980's. Historically, waste disposal in the region had been provided at local landfills operated by towns, cities, villages and private landowners, with minimal environmental safeguards. A 1969 planning study conducted for Oneida and Herkimer Counties identified 44 operating dump sites, both public and private, all of which posed varying degrees of threat to public health and the environment. In the early 1980's, health officials ordered the

closure of drinking water wells near several of these facilities. Twelve of these sites were ultimately identified as inactive hazardous waste disposal sites by State and Federal authorities. One, the privately operated Ludlow landfill in the Town of Paris, Oneida County, was named to the National Priorities List (Superfund) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*. JA 450a-52a, 475a, 477a.

Clean-up and remediation costs at these sites totaled over $74 million. In the case of the Ludlow landfill, regulatory action by the state to compel its closure led to wider litigation, in which over 600 local businesses, municipalities (29 of them) and other generators, were named as third-party defendants in a cost recovery action. Of the 44 operating dump sites in 1969, only one was operating at the time these local laws were adopted in early 1990. JA 447a-52a.

The private sector provided no solutions. In 1986, only the privately-operated Mohawk Valley landfill was available to serve the City of Utica, and its operators doubled their fees to the City on short notice. Mohawk Valley was itself unlined, operating without a state permit, and under regulatory pressure to close. In September 1986, local haulers, including two of the plaintiffs in this case, called upon the Counties to develop a new regional landfill as a safeguard against the closure of Mohawk Valley, which finally occurred in 1992. JA 447a-55a, 474a-80a, 414a-19a.

The "crisis" in solid waste management was apparent, and in response to demand by all sectors of the community, the Counties undertook to reform local disposal and establish a public system capable of serving the needs of all citizens in the region. At the request of the Counties, the New York State legislature created the Oneida-Herkimer Solid Waste Management Authority in September 1988. N.Y. Pub. Auth. Law §§2049-aa-2049-yy. Among the powers granted to the Authority and the Counties, Section 2049-tt(3) of the Act

expressly authorizes the Counties, "in recognition of the public policy of the state in the . . . management of solid waste" to "displace competition with regulation or monopoly public control" and to require "that all solid waste . . . shall be delivered to a specified solid waste management-resource recovery facility." [3] JA 417a-18a, 462a-65a.

In the same year that it created the Authority, the State of New York adopted the Solid Waste Management Act of 1988.[4] The 1988 Act established a hierarchy of waste management methods for the state, providing first for waste reduction, followed by re-use, recycling, recovery of energy, and finally land disposal in order of priority. The Act also mandated the preparation of both a state-wide solid waste management plan and a series of local plans to be adopted by regional planning units and approved by the state's Department of Environmental Conservation. The Authority was charged with preparing a solid waste management plan for the Oneida-Herkimer region. JA 417a-18a.

The Authority began the planning process at its initial meeting in the fall of 1988. By May 15, 1989, a Draft Local Solid Waste Management Plan (the "Plan"), together with a Draft Generic Environmental Impact Statement ("DGEIS") were ready for public comment. The Authority conducted public hearings and received comments on the Plan for the next eight months. Four formal public hearings were conducted in July and December 1989, and numerous informal presentations were made to local governments, civic organizations and industry groups, including the local waste hauling industry. The Authority conducted 15 regular meetings during this period, at which members of the public were invited to comment on the Plan and the future of waste

3. *See*, generally, Br. of *amicus curiae* Rockland County Solid Waste Management Authority for a discussion of the role of public service monopolies in our federal system.

4. N.Y. Solid Waste Management Act of 1988, c. 70, codified as amended in scattered sections Article 27 of N.Y. Envtl. Conserv. Law.

management in the region. By December 1989, the Authority had received over 10,000 letters and other written comments on various aspects of the Plan. JA 146a-51a.

FLOW CONTROL AND THE SOLID WASTE MANAGEMENT PLAN

The Plan calls for a comprehensive public system to safely manage all of the waste generated in the two-County region. The core concept of the Plan's approach is an "integrated system" in which different management methods are brought to bear on different components of the waste stream. The overall objective is to minimize the amount of waste destined for land disposal by providing facilities and incentives to separate and recycle as much waste as possible. By agreements with the Counties, the Authority acquired some of their existing facilities, and assumed the financial obligation for the construction and operation of additional facilities called for by the Plan. JA 465a.

The flow control laws were, and remain, the foundation of the Plan and the integrated system. Prior to 1991, no household recycling service was available anywhere in the region. To institute a region-wide recycling program, the Counties required the participation of homeowners to separate recyclables from other wastes, and the assistance of haulers to provide new collection arrangements to deliver recyclables and non-recyclables to the appropriate facility. The Plan did not call for public waste collection to displace existing collection arrangements, or limit private transactions in recyclable materials. It did require the participation of the local hauling industry to conform their services to the new approach. JA 431a-35a.

Since 1990, the public system in Oneida-Herkimer has developed into one of the most successful in New York State. As of 2003, the Oneida-Herkimer system had recycled over 370,000 tons of paper, containers and other materials,

composted 140,000 tons of green waste, and disposed or recycled over 260,000 gallons of liquid hazardous waste. These figures represent more than 1.5 years of regional waste generation diverted from landfills, avoiding $27 million in landfill disposal fees and generating over $14 million in revenue for the public. Over the same period, the Authority provided reliable disposal for 2.3 million tons of waste through contracts procured by competitive bidding in interstate commerce. In addition to the services provided by the Authority's facilities, the system aids local industry through the provision of free waste audits, and also provides extensive public education programs focusing on methods to reduce waste generation and maximize recycling. JA 130a-38a.

The integrated management system is supported by the system charge levied on the non-recyclable fraction of the waste stream. The Authority's recycling, composting, hazardous waste management and industrial waste audit programs are not structured to generate revenue, but to encourage the separation of recyclables, green wastes and hazardous waste for proper disposal. As discussed in detail in the expert report of Dr. Robert N. Stavins, the system charge is intentionally structured to create a differential price for the disposal of non-recyclable waste and recyclables, to serve as an economic incentive for recycling and waste reduction. JA 374a-87a. At $78/ton, it represents the cost of the entire range of Authority services provided to the community. It is not comparable to the market cost for disposal of a ton of waste at facilities that do not offer the bundle of services provided by the Authority.

The system charge is a user fee, which provides additional advantages as a method of financing the waste system. It distributes the costs of the system to the community on the basis of the amount of non-recyclable waste generated by the user. Haulers who use Authority facilities do not absorb

the cost of the system because they pass the disposal charges through to their customers in their bill for collection services. JA 362a. The system charge is a fee for service, and is the most equitable means of distributing the cost of the system to the businesses and residents of the Counties. JA 391a. Because the Authority is organized solely to provide waste services, the system charge is not used to subsidize other governmental programs, and has not served as a revenue source for the Counties.

There is no dispute that the flow control laws operate without differential impact on private disposal service providers, transporters, haulers and buyers of recyclable materials, regardless of their out-of-state or in-state location. The cost of the services provided through the public system is borne entirely by the residents and businesses of the Counties. On review of the record below, the Magistrate Judge, the District Court and the Second Circuit Court of Appeals, each concluded that the laws i) do not discriminate against interstate commerce; and ii) do not place any incidental burdens on interstate commerce that outweigh the substantial public benefits the laws provide as an integral part of the public solid waste management system established for the region.

SUMMARY OF THE ARGUMENT

The decision below should be affirmed. The Oneida-Herkimer flow control ordinances neither discriminate against interstate commerce nor place any incidental burden upon interstate commerce. The ordinances require all haulers and waste generators in the two Counties to deliver waste and recyclables to the Oneida-Herkimer Solid Waste Management Authority — a public system in which the local government has assumed responsibility for waste management.

Under the dormant Commerce Clause, discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Dep't. of Envtl. Quality*, 511 U.S. 93, 99 (1994). There is no discrimination here. Petitioners concede that in-state and out-of-state waste haulers, processors and transporters are treated alike. The flow control ordinances direct all collections to the publicly-owned facilities, thus they do not favor local private business interests over out-of-state private interests.

The Counties' flow control ordinances are not condemned by *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). Clarkstown required all waste to be processed at a designated *private* facility, "depriving competitors, including out of state firms, of access to a local market. . . ." *Id.* at 386. Thus, Clarkstown used its regulatory power to favor local enterprise. . . ." *Id.* at 394. Here, no local enterprise is favored.

Oneida-Herkimer mandates participation in a public system in which local government has assumed responsibility for waste management in order to protect public health and preserve natural resources. Assuming *arguendo* that such a non-discriminatory scenario has some incidental effect on interstate commerce, the Oneida-Herkimer ordinances pass the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) balancing test: "Where [a] statute regulates even handedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

The local benefits here are substantial. The flow control laws serve three public purposes that would not be served by private enterprise. First, the laws place the power to make disposal decisions in public hands, allowing the Authority to assume the risks and responsibilities that would otherwise

be carried by the Counties' residents and businesses under modern environmental law. Second, the laws allow the Authority to pursue policies designed to reduce waste and maximize recycling within the Counties in accord with national and state policy. Third, the laws allow the Authority to manage waste through an integrated system of programs and facilities designed to match specific components of the waste stream to the methods that suit them best.

The management of public waste disposal has historical roots. *See* Br. of *amicus curiae* Madison County, New York. For over 100 years, municipalities have performed their traditional duty to control solid waste from the time it is placed on the curb. *See, e.g., Gardner v. Michigan*, 199 U.S. 325 (1905); *Cal Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905). Oneida-Herkimer's laws place the responsibility for waste management with government, not private haulers, allowing the Authority to pursue important policy objectives of waste reduction, recycling and ensuing "the proper disposal of hazardous wastes thereby reducing the counties' exposure to costly environmental tort suits." *United Haulers* II, Pet. App. 20a.

The discriminatory Clarkstown ordinances in *Carbone* relied on the private market to manage local waste; the town's goal was only monetary. Oneida-Herkimer has assumed governmental responsibility to manage local waste; their goal is to protect public interests by preserving and protecting the public health and environment and ensuring compliance with laws designed to achieve those goals.

The Second Circuit doubted that the Oneida-Herkimer ordinances imposed "a differential burden triggering the need for *Pike* analysis." Pet. App. 16a. It declined to resolve the question because "we find it readily apparent that even if we were to endorse the Plaintiffs' claim that the Counties' ordinances burden interstate commerce by preventing the Counties' wastes from being processed by non-local facilities,

the resulting burden would be substantially outweighed by the ordinances' local benefits." Pet. App. 16a. The Petitioners concede that there is no differential impact on any cognizable out-of-state economic interest. No further inquiry is necessary because government regulation that does not differentiate between commerce in one state and another does not burden interstate commerce. The Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon v. Maryland*, 437 U.S. 117, 127 (1978). Therefore, the claim that the Commerce Clause gives commercial haulers the right to take waste to the disposal facility of their choice is not cognizable. Since all waste collectors are treated alike, Oneida-Herkimer's flow control laws are not unconstitutional.

The decision below should be affirmed.

ARGUMENT

I. The Oneida-Herkimer Laws Do Not Discriminate Against Interstate Commerce, And The *Pike* Balance Is The Appropriate Test For Review

C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994) did not establish a new constitutional rule and did not sweep away traditional constitutional distinctions between government service and private sector services, either in the limited field of waste disposal, or in any broader sense. *Carbone* was grounded in established precedent, both under the Court's relatively recent line of "waste cases" commencing with *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and the older established line of "processing cases" commencing with *Minnesota v. Barber*, 136 U.S. 313 (1890). Because it was so firmly grounded, no new rule of law can be inferred from the application of established law to the facts presented in the case. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968) (case does not announce new rule unless it indicates "that the issue involved

was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by [the Court])."[5]

The question presented here is not how *Carbone* might have been decided if the Clarkstown facility were unambiguously owned and operated by the town, but how the laws of Oneida and Herkimer Counties impact interstate commerce, and how and to what extent they provide benefits to the public. The court of appeals in *United Haulers* I applied established precedent to the facts presented, and properly found that the flow control laws serve non-protectionist purposes and do not discriminate against interstate commerce.

A. There Is No Discrimination Here, Therefore There Is No Commerce Clause Violation

Dormant Commerce Clause analysis is two-pronged: first a determination as to whether the challenged law discriminates against interstate commerce, and if not, whether the law places any incidental burdens on interstate commerce that outweigh the putative local benefits of the law. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

In *Oregon Waste Sys. v. Dept of Envtl. Quality*, 511 U.S. 93 (1994), the Court defined "discrimination" against interstate commerce: "As we use the term here, discrimination simply means differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter." *Id.* at 99. When a law is found to discriminate against interstate commerce, a rule of virtual *per se* invalidity applies, and the burden then falls on the government to demonstrate under strict scrutiny that the local interest sought to be protected cannot be adequately served by alternative means with a lesser impact on

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5. *See, also, Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) Kennedy, J., concurring in judgment, citing *Keene Corp. v. United States*, 508 U.S. 200, 215 (1993) (case does not announce new rule where claims are resolved "under well-settled law").

interstate commerce. *Id.* at 99, citing *Chem. Waste Management v. Hunt*, 504 U.S. at 340-41; *Maine v. Taylor*, 477 U.S. 131, 138 (1986). A discriminatory purpose can manifest itself on the face of the regulation, or in its practical effect. *City of Philadelphia v. New Jersey*, 437 U.S. at 626 (1978); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Each prong of the Commerce Clause analysis requires comparison of the effects of the challenged law on both in-state and out-of state interests. This comparison in turn requires a preliminary identification of the interests to be compared, in order to determine that they are "similarly situated," so as not to compare "apples to oranges."

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Gen. Motors v. Tracy, 519 U.S. 278, 298-99 (1997).

Thus, whenever the Court has found that a local regulation discriminates against interstate commerce, it has also found that some entity situated out-of-state is burdened in a different way than a similar entity located within the state. Where a differential burden is involved, the difference must be explained by some justification other than the injured party's state of origin. Specific differential treatment of in-state and out-of state interests has been found in each of this Court's recent waste cases, including *C&A Carbone v. Town of Clarkstown.*

In *City of Philadelphia v. New Jersey*, the State of New Jersey banned all out-of-state waste from its public and private landfills. Suit was brought by private landfill operators within New Jersey who served out-of-state municipalities. The Court found that New Jersey's purpose — to conserve both public and private landfill space within the state — was effected through a discriminatory mechanism. New Jersey targeted out-of-state waste for no reason other than its place of origin. Consequently, the state's residents continued to have New Jersey capacity available, but the burden of the regulation fell upon the residents of other states, who did not. The Court pointed out that the state could have acted to "slow the flow of *all* waste into the State's remaining landfills, even though commerce might be incidentally affected." *Id.* at 626. Thus, a general reduction in the commerce in waste (which is the object and effect of the Oneida-Herkimer regulations), would not have constituted discrimination for the *Philadelphia* court. Moreover, while the regulation extended to both public and private landfills, the Court pointedly expressed no opinion about "New Jersey's power, consistent with the Commerce Clause, to restrict to State residents access to state-owned resources," 437 U.S. at 627 n.6, recognizing the ability of public systems (such as Oneida-Herkimer) to limit service to their own region.

In *Fort Gratiot Sanitary Landfill v. Michigan*, 504 U.S. 353 (1992), the court struck a Michigan statute that prohibited private landfills from accepting waste generated outside of Michigan. Again, the state was attempting to conserve Michigan's private landfill capacity for Michigan residents, but did so without identifying any reason why out-of-state waste should be treated differently than local waste. Again, the burden of the regulation fell upon the residents of other states. The court expressly stated that "the case did not raise any question concerning policies that municipalities may pursue with respect to publicly owned facilities." *Id.* at 358-59.

City of Philadelphia and *Fort Gratiot* each represented attempts by states to preserve local disposal capacity by direct bans of out-of-state waste. *Chem. Waste Management v. Hunt*, 504 U.S. 334 (1992) and *Oregon Waste Sys. v. Oregon Dept. of Envtl. Quality*, 511 U.S. 93 (1994) represented attempts by states to slow the flow of waste into private facilities in Alabama and Oregon. The method adopted in each case was an assessment of fees on out-of-state waste at rates different from the fees assessed on in-state waste. In these cases the burden of the assessed fees fell disproportionately upon the shippers of out-of-state waste (and indirectly upon out-of-state generators) without an acceptable justification that out-of-state waste posed greater problems for the state than in-state waste. The differential treatment of out-of-state waste could not be justified for any reason other than the origin of the waste. Significantly, in *Chem. Waste Management* the differential fee was struck down, but Alabama regulations reducing the total intake of hazardous waste into the subject facility — without differentiating between in-state and out-of-state sources — were allowed to stand. *Id.* at 342-46.

In *Carbone*, two flaws in the Clarkstown scheme were identified. The first was the application of Clarkstown's ordinance to the Carbone processing facility, which was engaged in accepting New Jersey waste for ultimate disposal in Indiana. This had the effect of burdening residents of New Jersey with higher costs than they would otherwise have paid. *Carbone*, 511 U.S. at 388-89. As in *Philadelphia*, *Fort Gratiot*, *Oregon Waste and Chem. Waste Management*, the burden of the regulation was shifted to people outside of the state.

The second flaw in the Clarkstown scheme was the direction of Clarkstown's waste to a "single local proprietor," *Carbone* at 392, which in Clarkstown's case, was the privately operated transfer station designated in the ordinance. The court found this aspect of the arrangement

unconstitutional because the town denied access to the local waste market to both Carbone and other "rival businesses" of the Clarkstown facility. *Id.* at 394. The burden on interstate commerce due to the designation of a single local proprietor was to favor that particular proprietor and disfavor all others, including competing facilities located out-of-state.

Neither of the flaws identified in the Clarkstown scheme are present here. In Oneida-Herkimer, the laws do not apply to waste generated outside of the Counties, and there is no burden shifted to the residents or waste generators in other states. As the courts below found, the entire financial burden of the Oneida-Herkimer system, as implemented by the local laws, falls on the residents and waste generators of the Counties.[6] There is no interference with any regulatory regime in any other state, or in any other county within New York State, that would either increase the costs or limit the disposal options of any person outside of Oneida and Herkimer Counties.

Petitioners argue that the unconstitutional favoritism to the "single local proprietor" in *Carbone* should be equally unconstitutional whether the favored entity is a privately-operated facility or an unambiguously public facility. This reading assumes that the Court adopted the proposition that there is no difference between public and private facilities that handle solid waste, and that there is, or should be, no constitutional distinction between the public sector and the private sector for Commerce Clause purposes. This is not

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6. As noted in the expert report of Dr. Robert Stavins and confirmed in depositions of the plaintiffs, the practice of the waste collection industry is to pass disposal costs, as well as other operating costs, through to the consumers of collection services. While Dr. Stavins recognized the possibility that some cost of compliance with the laws might not be passed through, or might be borne by residents of neighboring counties, there was no evidence presented that any such costs would be of a non-trivial nature, or would extend to other states. JA 360a-63a.

stated in the decision,[7] and the Court should not adopt such a proposition now.

B. The Public Purposes Served By Oneida-Herkimer Distinguish This Case From Carbone

An examination of the different purposes of the Clarkstown and Oneida-Herkimer laws reveals the constitutional distinction. Clarkstown's arrangement with its operator was not public management. The Oneida-Herkimer system is publicly managed.

The Oneida-Herkimer laws serve three public objectives that were not served by Clarkstown's ordinance. First, the purpose of the Oneida-Herkimer laws is to place the power to choose how the public's waste is to be managed in the hands of local government, and to take that decision-making power out of the hands of private haulers and processors. Second, the laws allow the Authority to pursue policy objectives of waste reduction and recycling, which are antithetical to private sector waste interests, and uniquely governmental. Third, the laws allow the Authority to employ methods of waste management, including a variety of technical, administrative and economic tools, which are

7. The language of the majority opinion in *Carbone*, which the court of appeals in *United Haulers* I described as "elusive" (Pet. App. 45a), does not resolve the issue. The majority characterized the town's purpose in adopting the law as a means to finance "its new facility" *id.* at 387, and "its project" *id.* at 394, in the sense that the town's right to possess the facility would come about with the exercise of a right to purchase the facility for $1 after the end of five years. *Id.* at 387. The majority refers to the designated transfer station as a "town-sponsored facility" *id.* at 393, as a "favored local operator" *id.* at 389, a "favored operator" *id.* at 391, as "the preferred processing facility," a "single local proprietor" and "local business" *id.* at 392, but never describes it as a public facility. Justice O'Connor's concurring opinion describes it as the "town-authorized facility" *id.* at 402. The dissent characterizes it as "a single processor" which is "essentially an agent of the municipal government." *Id.* at 416.

uniquely effective and also uniquely governmental. All three are non-protectionist, non-discriminatory public purposes.

1. The First Objective: Public Assumption Of Environmental Risk On Behalf Of The Community

The Counties, and communities across the nation, were facing a failed waste management system in the 1970's and 1980's. The Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, changing the paradigm for environmental responsibility, and making generators of waste liable for the costs associated with improper disposal. Oneida and Herkimer Counties recognized this new paradigm, and acting in their role "as guardian[s] and trustee[s] for [their] people" *Reeves v. Stake*, 447 U.S. 429, 438 (1980), the Counties established a new public disposal system to interpose local government between their citizens and the environmental liabilities associated with waste generation and disposal.

Petitioners argue that the public disposal system in Oneida-Herkimer burdens interstate commerce by denying the private sector the ability to offer low cost disposal to Oneida-Herkimer waste generators. Pet. Br. 11. The argument essentially rests on a single assertion: "When in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce." *Id.* at 49. Because the laws deny the haulers the ability to seek out the lowest cost disposal available in the market place, the argument runs, the "economic viability" of out-of-state facilities is threatened. *Id.* at 16-17. Neither argument has merit.

First, as Petitioners concede, the alleged threat to the economic viability of out-of-state facilities is fully shared by all in-state facilities. There is no differential treatment of

either, and hence no discrimination against interstate commerce. *See Oregon Waste Sys., supra.*

Second, the premise is simply wrong. Oneida-Herkimer generators have not hired commercial haulers to dispose of their waste; they have only hired them to collect it. In the absence of flow control, commercial haulers would seek low-cost disposal options without consulting their customers. To gain control of disposal, generators in Oneida-Herkimer elected legislators to make disposal decisions on their behalf. Here, the generators' message to their haulers is: take the waste to the public system.

This first primary objective of the laws — that regional waste must go to public, not private, facilities for processing and disposal — is the foundation for the court of appeals' finding, in *United Haulers* I, that the laws do not serve a protectionist purpose and do not discriminate against interstate commerce. "Not only are such regulations 'less likely to be protectionist' [when they direct waste to public facilities] they are less likely to give rise to retaliation and jealousy from neighboring states." Pet. App. 48a.

The public system at work in Oneida and Herkimer Counties is distinguishable from the hasty arrangement made by Clarkstown with its private transfer station operator. The key difference is Oneida-Herkimer's affirmative assumption of responsibility for disposal of the public's waste, reflected in its comprehensive plan for programs and facilities, its direct receipt of waste and recyclables, its receipt of the fees paid by the public, and its presence as a party in all of the subsequent transactions with vendors, transporters, disposers, and buyers of recycled materials, with the attendant risk and legal liability that accompanies the provision of service. Clarkstown avoided taking responsibility for disposal of its citizens' waste.

In Oneida-Herkimer, the necessity for the assumption of governmental responsibility for waste disposal was prompted by the sweeping changes in American environmental law and policy since 1976. With the adoption of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, broad new responsibilities and liabilities were created for generators of solid and hazardous wastes, including municipalities, small businesses and individuals. RCRA provided for the systematic identification of toxic and hazardous substances by federal and state officials, together with new methods for their management. CERCLA provided harsh new liabilities for the improper disposal of wastes, including strict, joint and several liability for investigation, clean-up and remediation costs.

"The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of clean-up." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (emphasis in original); *United States v. Best Foods*, 524 U.S. 51, 56 (1998). These liabilities extend to whole classes of transporters and "arrangers,"[8] who could be ordinary citizens and small businesses whose wastes find their way to contaminated sites. CERCLA liability has been held to attach not only to hazardous wastes regulated "cradle to grave" under RCRA, but to ordinary municipal solid wastes that contain hazardous substances, even in trace amounts.[9] Generators are

8. CERCLA, 42 U.S.C. §9607(a)(3) provides that "persons who have arranged for disposal . . . , or arranged with a transporter for transport and disposal" are liable for those hazardous substances they owned or possessed."

9. *See St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195 (1st Cir. 1994); *BF Goodrich v. Murtha*, 958 F.2d 1192, 1202 (2d Cir. 1993); *Alcan Aluminum Corp. v. United* (Cont'd)

equally responsible, with transporters and the owners of contaminated sites, for the environmental injuries caused by improper disposal. Generators do not escape this liability when they hire commercial haulers. To the contrary, CERCLA prompts generators to take greater control over the decisions involved in waste disposal.

These laws were applied in Oneida and Herkimer Counties with the designation of several local landfills as inactive hazardous waste sites under New York Law,[10] and the commencement of CERCLA litigation involving hundreds of local defendants to remediate a National Priorities List (Superfund) site in Oneida County. JA 447a-52a, 472a-78a. As these environmental threats were identified, the community recognized that waste disposal decisions were too important to be made by their trash haulers. They called for a new public agency to assume responsibility.

Petitioners and their *amici* characterize the Counties' environmental concerns as "misguided," Pet. Br. 19 and "flawed," NSWMA Br. 23, pointing out that "If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it." Pet. Br. 19. This observation is true, but it entirely misses the point of the Counties' system and laws. The Counties and the Authority are taking possession of the region's waste in order to reduce the exposure of their

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(Cont'd)

States, 964 F.2d 252, 260-61 (3d Cir. 1992); *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726 (8th Cir. 1986); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990).

10. N.Y. Envtl. Conserv. Law §§ 27-1301-27-2403.

residents and businesses to environmental liability. The public placed the disposal choice in the hands of their government precisely because they believed they could better avoid exposure to liability through a public system than by leaving the decisions with commercial haulers.

Clarkstown, in contrast, did not take possession of its citizens' waste. Instead, it commanded its citizens to deal with a private entity for waste service, and promised only that if the operator did not receive sufficient revenue through the transactions forced by the law, the town would make up any shortfall. *Carbone* at 387. The operator, in turn, enjoyed a private monopoly for five years, allowing the town to sit on the sidelines until the passage of time would allow it to claim the operator's facility. If the operator were to deliver Clarkstown waste to an environmentally-unsafe facility, the residents of Clarkstown could be exposed to liabilities as "arrangers" under CERCLA because their transaction with the operator sent the waste on its way. But the town would avoid exposure to those liabilities because it avoided taking possession of the waste. Pet. Br. 19.

The Court recognized in *Carbone* that Clarkstown "elected to use the open market to earn revenues for its project" when it granted the private facility an exclusive right to receive local waste in exchange for the deferred receipt of a transfer facility, *id.* at 394. Unlike the fees charged by the Authority for its services, the citizens' fees in Clarkstown went to the operator. Because the Clarkstown arrangement relied on the private operator to manage local waste, it was properly prohibited from employing "discriminatory regulation to give that project an advantage over rival businesses from out-of-state." *Id.* at 394.

The assumption of the responsibility and potential liabilities associated with waste management is a traditional governmental function. The process undertaken by the Counties and the Authority to establish a public system, and

then to craft a Plan stating its objectives and management methods, was an exercise of democracy, taken after months of public hearings and discussion. As a result of this process, the Authority and the Counties identified the essential facilities necessary to provide the beginnings of an integrated system, and then issued over $55 million in public bonds to begin construction. Pet. App. 27a. Clarkstown made no capital investment in waste management.

2. The Public System In Oneida-Herkimer Does Not Compete With Private Sector Services

Another flaw in Petitioners' argument is the false notion that the Counties' system competes with services offered by the private sector. The role of the Authority in Oneida-Herkimer is not comparable to the roles played by the "rival" private processing facilities in Clarkstown.

The Clarkstown ordinance was enforced against the Carbone processing facility, directing it to deliver waste generated in New Jersey to the Clarkstown facility after it had been received and processed by Carbone. The Oneida-Herkimer laws would not have this effect. The laws are applicable solely to haulers and generators within the Counties, and do not regulate private processing facilities, landfills or other disposal facilities. If the Carbone facility were located within Oneida or Herkimer Counties, the laws would not prevent its operation, or its acceptance of waste from other states or local sources. The Oneida-Herkimer laws would prevent local haulers and generators from delivering to it, but it would not be subject to prosecution for accepting local waste. No hauler in Oneida-Herkimer is prevented from collecting waste outside of the Counties and delivering it anywhere, including a private facility located within the Counties.

The Authority provides disposal service only to the citizens of Oneida and Herkimer Counties, to whom it owes

a governmental responsibility.[11] In fulfilling its governmental responsibility within the Counties, the Authority does not compete with private disposal services located in other states or elsewhere in New York. Any competition between the Authority and the private sector could only occur if the Authority were to offer service to persons to whom it does *not* have a governmental responsibility, such as residents of other jurisdictions. But because the Authority does not accept waste from areas outside of the Counties, it does not compete with other disposal service providers in those markets either.

3. The Market Participant Doctrine Does Not Apply In This Action By Appellant Haulers, And Any Indirect Regulatory Effect On Non-Parties Is Not Discrimination Against Interstate Commerce

The Counties and the Authority do not raise the market participant doctrine as a defense against the claims of the haulers. The doctrine applies to non-regulatory activities that "fall outside of the scope of activity governed by the dormant Commerce Clause." Pet. App. 11a-12a. As to the appellant haulers, the market participant doctrine is simply not an issue in this case, because the Counties and the Authority do not claim that the haulers are not regulated by the flow control laws.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1984), the Court found that the restraints of the dormant Commerce Clause do not apply to the actions of states when they act as participants in commercial markets, and not as regulators of those markets. In *South Central Timber v. Wunnicke*, 467 U.S. 82 (1984), the Court made clear that the market participant doctrine allows a state to impose burdens on commerce in the markets in which it participates, but not

11. The Authority is obligated to provide services to the citizens of the Counties, and precluded from accepting waste generated elsewhere. *See* N.Y. Pub. Auth. Law § 2049-ee(7) (McKinney 2006).

in "downstream" markets where it exercises government power as a regulator. *Id.* at 95.

The Petitioners argue here, as they argued below, that because the Authority is a participant in the disposal marketplace, it cannot use its regulatory power to favor its own facilities at the expense of interstate commerce. App. Br. 33-37. This is not a correct statement of the doctrine. The market participant cases do not prohibit regulations that favor public facilities. They prohibit municipalities from regulating *and also* claiming immunity from commerce clause scrutiny as market participants.

These laws unquestionably regulate the conduct of the haulers in directing them to deliver to public facilities. The establishment of a public disposal system is also the act of a sovereign. The Counties do not claim any exemption from the strictures of the Commerce Clause in adopting and enforcing the local laws that place disposal power in government hands. The Counties regulate the haulers, but do not discriminate or otherwise burden interstate commerce.

Had this case been brought by a private landfill, the Authority might rely upon the market participant doctrine to defend its right to choose other landfills for disposal of Oneida-Herkimer waste from 1991-2006, or to cease trading with all private landfills after 2007. As the court of appeals found in *United Haulers* II, the Authority does indeed participate in the marketplace "as any other economic actor would when, after having employed its regulatory powers to compel delivery of the waste . . . to its processing facilities, it contracts with private parties to deliver its processed wastes to landfill sites that meet its requirements."[12] But because the Authority does not employ any uniquely governmental

12. *See* Br. of *amicus curiae* National Association of Counties at 19-22 for a response to petitioner's reliance on the market participant doctrine.

power to regulate those with whom it does business, "the outcome of its bidding process is simply not a concern of the Commerce Clause." Pet. App. 12a.

The flow control laws do not apply to landfills or other disposal facilities, and no out-of-state landfill or other disposal facility is a party to this case. But even if the Court were to consider the operation of the public disposal system as a kind of "downstream" regulation of private landfills, such an effect does not violate the Commerce Clause. As the courts below found, nothing in the Authority's procurement policies operated to favor in-state entities over out-of-state entities in the selection of landfills for regional waste during the 1991-2006 period. In using its new public landfill from 2007 forward, the Authority is withdrawing from the commercial market altogether, which denies waste to in-state and out-of-state landfills alike. Moreover, the removal of regional waste from both intrastate and interstate commerce is at most an "indirect" effect on interstate commerce, reviewable under the balancing test of *Pike. Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

4. Waste Reduction And Recycling Are Unique Governmental Purposes Consistent With National And State Policies

The second governmental objective served by the laws is the pursuit of established state and federal solid waste policy. The objective of the Counties' Final Local Solid Waste Management Plan "is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream." JA 144a. This objective is in accord with the statutory policy of the State of New York, which establishes four state-wide management priorities:

> First, to reduce the amount of solid waste generated;
>
> Second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> Third, to recover, in an environmentally-acceptable manner, energy from solid waste that cannot be economically and technically reused and recycled; and
>
> Fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department.

N.Y. Envtl. Conserv. Law §27-0106(1) (McKinney 2006).

National policy in waste management has the same priorities. RCRA provides:

> The objectives of this chapter are to promote protection of health and the environment and to conserve valuable material and energy resources by providing technical and financial assistance to state and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including new more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of non-recoverable residues. . . .

42 U.S.C. § 6902(a).

These statutes all call for change in the way the nation, the states and local communities manage their wastes. The new approaches called for by RCRA included not only innovations in technology, but changes in the disposal habits of ordinary citizens, and in the customs and practices of the waste industry.

RCRA expected that "the collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies . . ." 42 U.S.C. §6904(a)(4). It is not necessary for states and local governments to secure special authorization from Congress to provide solid waste services to their citizens. Congress expected state and local agencies to exercise their sovereign powers.[13] The Commerce Clause requires those powers to be exercised in a non-protectionist, non-discriminatory manner. This Court has long recognized that government regulation "for the purpose of protecting the health of its citizens-and not simply the health of its economy-is at the core of its police power." *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982). The Oneida-Herkimer laws, like the waste policies of the state and federal governments, were adopted to protect health and the environment. They are not protectionist.

The citizens of Oneida-Herkimer endorsed these non-protectionist policies through their participation in the extensive process undertaken by the Authority to identify the elements of the public system and prepare the Local Solid Waste Management Plan.[14] The people contributed to the creation of a waste system that would require them to pay "more than twice as much as they had paid for waste disposal

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13. *See* Br. of *amicus curiae* Onondaga County Resource Recovery Agency, et al., for discussion of the police power and RCRA, 42 U.S.C. §6901, et seq.

14. Clarkstown, unlike Oneida-Herkimer, was not a designated planning unit under New York law. N.Y. Envtl. Conserv. Law §27-0107(1)(a).

services prior to the adoption of the flow control laws." Pet. App. 48a. The planning process shows that there are "major in-state interests adversely affected" by the laws, which this Court has recognized are "a powerful safeguard against legislative abuse" and indicative of non-discriminatory purposes. *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 200 (1994).

Oneida-Herkimer's objectives — to shield their citizens from environmental liability and to focus their waste policies on the reduction and recycling of local waste — are uniquely governmental, flowing from the sovereign power of the State of New York, and protected by the 10th Amendment to the Constitution. As this Court remarked in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), "it may be taken as firmly established that the States possess, because they have never surrendered, the power . . . to prescribe such regulations as may be reasonably necessary and appropriate for the protection of the public health and comfort." *Id.* at 318. *See* Br. of *amicus curiae* State of New York, et al.

Because these objectives are not protectionist, and in the absence of any evidence of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Oregon Waste Sys.*, 511 U.S. at 99, the court of appeals correctly found that the laws do not discriminate against interstate commerce, and that the *Pike* balancing test was the proper standard to employ in assessing any incidental burdens that the laws placed upon interstate commerce.

II. The Oneida-Herkimer Laws Pass The Balancing Test Of *Pike v. Bruce Church*

A. The Laws Place No Cognizable Incidental Burden On Interstate Commerce

No evidence of differential treatment to any specific out-of-state interest was offered by Petitioners in *United Haulers* I, but the court of appeals remanded the matter anyway for "discovery and further argument by the parties, which will undoubtedly assist the district court in this fact intensive determination." Pet. App. 52a. Detailed examination of the effects of the laws on the various in-state and out-of-state entities followed in the district court. The entities examined included generators of wastes, haulers such as the plaintiffs, transporters, processors, landfills and other service providers, together with the regulatory interests of governmental agencies in other states. There was no evidence that any of these classes of interests were treated differently by the laws due to their in-state or out-of-state character. Pet. App. 66a-67a. The Petitioners conceded in discovery that they did not even contend that there is any greater burden placed upon an out-of-state entity by the laws than on a similarly situated in-state entity. JA 350a. The record in the courts below confirms this undisputed fact. Pet. App. 89a-100a, 66a-68a.

Examination of the patterns of commerce in waste after creation of the Authority's system also revealed no discriminatory effects on interstate interests. From an economic perspective, the report of Dr. Stavins established that the Authority's early decision to construct the first major transfer station in the region actually lowered the cost of transporting non-recyclable waste from Oneida-Herkimer into interstate commerce, commenced such shipments earlier than would otherwise have occurred, and sent greater tonnages into interstate commerce than would otherwise have occurred. JA 363a-69a. For recyclable materials, the laws' source separation requirements have facilitated a high level

of recycling and have sent several hundred thousand tons of recyclables to markets, many of them in interstate commerce. JA 359a.

Despite the absence of any differential impact on out-of-state interests, or indeed, *because of* this lack of evidence, Petitioners argue that an even-handed regulation cannot, by definition, have any materially-different impact on an out-of-state interest compared to an in-state interest. According to their argument, if any differential impact is present, no matter how slight, the regulation discriminates against interstate commerce and the rule of "per se" invalidity should apply. Pet. Br. 46-47. Therefore, Petitioners claim, the court of appeals misconstrued the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970). Their argument is baseless.

This Court has never demanded that state and local regulation display a faultlessly perfect balance of in-state and out-of-state burdens. The court has always recognized that regulations can be "even-handed" and still have different effects on out-of-state and in-state commerce. "When a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Indeed, the Court has always recognized that there is "no clear line" between a discriminatory and an incidental burden on interstate commerce. *Carbone*, O'Connor, J., concurring at 402. "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579.

Here, the overall effect of the flow control laws on both local and interstate activity is to reduce the commerce in disposal services for non-recyclable waste, and to increase the commerce in recyclable materials. The Report and

Recommendation of the Magistrate and the Decision of the District Court each held that no incidental burden on interstate commerce was established because Petitioners could not show any qualitative or quantitative difference in the treatment of in-state and out-of-state interests under the laws. Because no incidental burden was shown, it was unnecessary to engage in a balance of non-existent burdens against the obvious benefits the laws provided to the public. Pet. App. 66a-73a, 95a-99a.

In *United Haulers* II, the court of appeals considered the Petitioners' argument that the burden on commerce consisted of the withholding, or "hoarding," of waste from intrastate and interstate markets, even without a showing of differential impacts. Pet. App. 13a. The court of appeals declined to decide whether such a withholding constitutes a cognizable burden, but held that if that effect was a burden, it was slight in comparison with the substantial benefits afforded by the laws. Pet. App. 16a.

In substance, the Petitioners' argument on the "withholding" or "hoarding" of waste is that because the laws have the effect of reducing the amount of waste in commerce (both intrastate and interstate), there is a burden created, characterized as an "export barrier" that the dormant Commerce Clause should prohibit. This Court's dormant Commerce Clause jurisprudence requires rejection of this theory for two reasons.

First, the Commerce Clause has never been construed to prohibit fair, across-the-board regulation of commerce that has the effect of reducing the amount of trade in a given commodity. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld Indiana regulations governing takeovers of Indiana corporations, rejecting the argument that the dormant Commerce Clause was violated because the law tended to reduce the number of transactions made.

> Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity-resident or nonresident-from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control.

Id., 481 U.S. at 93.

Government frequently regulates with the intention of reducing commerce in goods and services. Regulations prohibiting certain forms of advertising for cigarettes are unquestionably intended to reduce the nation's consumption of tobacco, but they are not unconstitutional. Regulations banning the sale of lead in gasoline and paints undoubtedly have an adverse effect on the nation's commerce in lead, but they do not offend the Commerce Clause. These kinds of regulations are valid because they regulate all commerce in the commodity, and do not distinguish between commerce in one state and another.

The second reason that Petitioners' argument must fail is that it would use the Commerce Clause to shore up the old structure of the waste markets, in order to protect the position of low-cost landfills in those markets.[15] These low- cost facilities compete with other disposal technologies that may offer, for example, greater environmental protections at higher cost. Their interests do not coincide with the kinds of innovation in management that the Authority represents. The

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15. *See* Pet. Br. 11 "The ordinances . . . bar [] patronage of out-of-state facilities that offer-those services at lower prices. NSWMA Br. at 20. Sussex Br. at 9.

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landfills have allied themselves here with local haulers who are responsive to the attractions of low-cost disposal.[16]

This partnering of haulers with low-cost landfills enjoys no special constitutional protection. The old structure of waste markets relied almost exclusively on disposal by haulers in dumps and landfills. RCRA was adopted to change that structure by encouraging recycling and energy recovery at the expense of land disposal. In Oneida-Herkimer from 1991-2006, the Authority supplanted the haulers as the purchaser of landfill service, for a diminished amount of non-recyclable waste, reduced by the Authority's recycling and reduction programs. While landfills, as a class of disposal facilities, may receive less waste from local haulers than they might otherwise receive due to the success of national, state and local recycling policies, the Commerce Clause does not protect them from changes in market conditions — even where the changes are prompted by regulation.

This Court has made it clear that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon v. Maryland*, 437 U.S. at 127; *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at 93. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon*, 437 U.S. at 126. These principles have special significance here because the protections Petitioners seek would block government efforts to reduce the public's exposure to environmental liability, and frustrate national waste policies that encourage innovative approaches to waste management.

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16. In depositions, the haulers testified that their likely choice of out-of-county disposal sites would be dictated solely by cost, and that in-state, rather than out-of-state landfills would be preferable due to the cost of transportation. JA 364a, n.12.

Finally, Petitioners' concede that a public waste system that includes public collection as well as disposal service is constitutional. Pet. Br. 48-49. The Counties surely could institute public collection and completely displace the private hauling industry.[17] But such an action would be both wasteful and unnecessary, as the Counties' interest is in proper disposal, not in putting the region's commercial haulers out of business. Moreover, it is hard to see why this broader waste service monopoly would not offend the Commerce Clause to a greater extent than the less intrusive regulation of flow control. With public collection, the government would still be able to direct local waste to its own facilities, the economic interests of private disposal facilities would be equally threatened, and any other burdens placed on interstate commerce by a public disposal system would be unchanged.

The Petitioners' interests and those of their *amici* are at odds when it comes to collection. The Oneida-Herkimer laws do not threaten the haulers' livelihoods. Not every hauler in Oneida and Herkimer Counties is willing to support Petitioners' view that the Commerce Clause denies government the power to control disposal of waste unless it also exercises its power to collect. *See* Br. *amicus curiae* Mohawk Valley EDGE.

Because there is concededly no differential impact on any out-of-state economic interest affected by the laws, and because the particular low-cost business arrangement advocated by the haulers is not protected by the Commerce Clause, there is, in

17. The power to provide public waste collection services is granted to New York's county governments Section 119 of the New York General Municipal Law. N.Y. Gen. Mun. Law §119 (McKinney 2006). The Authority is granted the power to provide collection services by New York Public Authorities Law Section 2049-ee(4). N.Y. Pub. Auth. Law §2049-ee(4). Where public collection is instituted, municipalities may contract with private haulers to perform the service, and direct them to specific disposal facilities pursuant to the contracts. *U.S.A. Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995).

fact, no incidental burden placed upon interstate commerce by these laws. Under these circumstances, several courts of appeals are in agreement with the district court that logic does not require any further inquiry, or comparison of the benefits of the flow control laws to non-existent burdens.[18]

Nevertheless, if one examines the benefits here, all doubt is erased.

B. The Counties' Integrated System Of Waste Management Provides Benefits Possible Only Through Flow Control

The third governmental purpose of the flow control laws is integrated management. The laws divide the waste stream into component parts and direct each component to a facility best suited to recover useful commodities, or dispose of it in the most environmentally-sound manner. The Authority operates eight different facilities to receive, process and dispose of the region's waste, all of which operate in concert to fulfill the Solid Waste Management Plan's commitment to the maximization of waste reduction and recycling. The effectiveness of this integrated management system is no longer challenged by the Petitioners. The particular benefits of each of the Authority's recycling, composting, hazardous waste and landfill facilities and programs are set forth at length in the Joint Appendix and need not be restated here. JA 115a-39a, 353a-95a, 419a-31a.

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18. *Nat'l Paint & Coatings Association v. Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Old Bridge Chem., Inc. v. New Jersey Dep't of Envtl. Protection*, 965 F.2d 1287, 1295 (3rd Cir. 1992); *Nat'l Solid Waste Management Assoc. v. Pine Belt Regional Solid Waste Auth.*, 389 F.3d 491, 502 (5th Cir. 2004); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994); *New York State Trawlers Assoc. v. Jorling*, 16 F.3d 1303, 1308 (2nd Cir. 1994); *V-1 Oil Co. v. Utah State Dep't of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997).

However, two particular benefits of the flow control laws should be emphasized. First, the application of different technologies to different components of the waste stream is possible only through a system of regulation. The flow control laws establish a uniform set of rules to govern the disposal practices of all waste generators and haulers in the region, defining the categories of waste that can be recycled, composted or consigned to land disposal. Uniform participation by generators provides a stable foundation to the system, allowing the Authority to introduce new services as technologies and markets develop. Regulation of haulers ensures that the collection industry participates in the Solid Waste Plan to the same extent that generators participate, delivering to the same facilities and paying the same charges.

Private market forces could not produce this community-wide participation or achieve the high levels of recycling and environmental awareness obtained through integrated management. Only government involvement and the application of the flow control laws makes it possible. *See* Stavins, JA 374a-78a.

Second, the flow control laws make it possible for the Authority to provide the integrated "bundle" of benefits through the system charge on non-recyclable waste. This $78/ton charge delivers not only landfill transportation and disposal, but recycling, composting, household hazardous waste disposal and all of the other program benefits provided by the system. The system charge makes it possible for the Authority to accept recyclables and household hazardous wastes without charging a fee for those materials, and at the same time, provide an incentive to businesses and individuals to reduce their generation of non-recyclable waste. As Dr. Stavins pointed out, "Flow control makes possible financial incentives for waste reduction and recycling that are unachievable through other means." JA 388a-92a.

Private markets could not provide these benefits. Only government regulation makes it possible to provide a variety of waste services that are not structured to generate revenue, and at the same time distribute the cost of the entire system according to the amount of non-recyclable waste an individual user generates. JA 381a-82a, 388a-91a.

The haulers ask the Court to compel Oneida-Herkimer to allow them to take non-recyclable waste to anywhere they might find a lower price. This would require the Authority to "unbundle" its package of benefits, and lose many of the benefits altogether. For example, if haulers were allowed to take waste out of the Counties, the Authority would not be able to insist upon higher environmental standards at private landfills elsewhere, because, as the Court pointed out in *Carbone*, a local government regulating private transactions may not exercise its police power beyond its borders. *Id.* at 393. As discussed above, restoring the decision-making power over disposal to the haulers would expose local generators to liabilities arising from poor choices made by the haulers.

Without flow control and the system charge, the Authority would not be able to accept recyclables, green wastes and household hazardous wastes at no charge, and the substantial incentives for recycling and waste reduction would be lost. From an administrative point of view, the Authority's ability to enforce the recycling provisions of the laws would be lost, because there would be no means to inspect loads of waste bound for private landfills for the presence of recyclables. Most importantly, without the flow control laws there would be no means to mandate the participation of either haulers or generators in the Counties' solid waste plan, and no possibility that the federal, state or local waste reduction and recycling objectives could be met.

As the court of appeals observed in *United Haulers* II, the benefits of the system are intrinsically tied to the laws.

> We agree with plaintiffs that some of these goals, particularly those relating to revenue generation, also might be achieved through other instruments of municipal policy. However, nothing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control.

Pet. App. 20a.

C. Widespread Adoption Of Flow Control Similar To Oneida-Herkimer's Laws Would Not Burden Interstate Commerce

If other communities were to adopt flow control laws similar to those of Oneida-Herkimer, Petitioners and their *amici curiae* forecast doom to an interstate trade in waste that is based upon low-cost disposal. But the size of the private interstate market in waste is dwarfed by the far larger intrastate market, and the public's own investment in waste infrastructure. According to Petitioners' own figures, 60% of all disposal facilities in the United States are publicly owned, NSWMA Br. 7, and more than 90% of the nation's waste is disposed of before it crosses any state lines. JA 240a. The interstate trade in waste services is unlikely to suffer any injury at all if laws and public systems like Oneida-Herkimer's become the norm.

The potential effects of the adoption of similar flow control laws and systems by other municipalities were the subject of expert testimony examined by the courts below. Dr. Stavins established that with the adoption of flow control

and the Authority's construction of the first major transfer station in the Oneida-Herkimer region, interstate shipment of waste from the region occurred earlier, and involved larger quantities of waste, than would have been the case if the private sector had been free to act on its own. JA 360a-69a.

Moreover, Dr. Stavins also pointed out that the widespread adoption of flow control, as implemented in Oneida-Herkimer, would almost certainly *increase* the interstate trade in waste. Municipalities do not find any assistance from flow control in siting landfills or other disposal facilities within their borders. With flow control, densely populated municipalities would be far more likely to build transfer facilities to assist in the export of waste, and the transfer stations they build would facilitate greater interstate shipment of waste at the expense of intrastate shipment. JA 370a-72a, 393a, 408a-12a.

To the extent that a municipality would, like Oneida-Herkimer, elect to send its waste to its own public landfill, the effect on all private disposal facilities, whether in-state or out-of-state, would be exactly the same. Local disposal, as opposed to export, would have the benefit of reducing the environmental impacts of shipping, particularly the impacts borne by other communities that suffer from air pollution, traffic and other burdens.[19] Moreover, any reduction in the volume of waste entering the market due to construction of a new public landfill would tend to reduce prices in both the intrastate and interstate disposal markets. JA 372a.

To the extent that municipalities would use flow control to establish integrated systems, as Oneida-Herkimer has, using combinations of technologies to reduce the volume of waste, the result would be an incontrovertible good, advancing the declared goals of Congress in RCRA. In this regard, flow control would make it possible for communities

19. *See* Br. of *amicus curiae* Environmental Defense.

to select new and innovative technologies that provide greater environmental benefits than technologies currently in use, particularly where the community is prepared to shoulder a higher short-term cost to gain long-term health and safety benefits.[20]

For communities such as Sussex or Charles City Counties in Virginia, nothing in these laws resembles the waste import bans examined by this Court in *City of Philadelphia v. New Jersey* and *Fort Gratiot v. Michigan*. Those cases struck down laws barring private landfills in New Jersey and Michigan from accepting out-of-state waste. The Oneida-Herkimer laws have no effect whatsoever on the ability of private landfills to accept waste. As discussed above, the Authority does not compete with private landfills at all because it serves the citizens of the Counties, to whom it owes a governmental responsibility. Moreover, as discussed above, the difficulties inherent in siting new landfills makes it more likely that communities adopting flow control will build transfer stations as the Authority did in 1991. Communities without space or means to build will still rely on export to secure disposal capacity. If the landfills in Sussex and Charles City see any decline in waste volume in the future, that may come from the nation's success in its policy to reduce waste and increase recycling. But such a change in the general commerce in waste would not affect landfills in Sussex or Charles City to any greater degree than landfills in New York.

Finally, neither the courts, the waste industry, nor local governments have developed any settled expectations based on *Carbone*. To the contrary, as Petitioners pointed out, Pet. 25-28, courts have adopted conflicting interpretations of the meaning of *Carbone*, and municipalities have

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20. *See* Br. of *amicus curiae* Arkansas Association of Regional Solid Waste Management Districts, et al.

developed ad hoc arrangements to secure the benefits of flow control found to be constitutional by different courts.[21]

The public/private distinction articulated by the Second Circuit has the virtue of simplicity: municipalities that assume responsibility for the waste disposal needs of their citizens must do so fairly, favoring no private interest above any another.

The purposes underlying the Court's dormant Commerce Clause jurisprudence, as articulated by Justice Jackson in *HP Hood & Sons v. DuMond*, 336 U.S. 525 (1949), continue to reflect a balance between safeguarding the movement of interstate commerce and affording the states the power to effectively address threats to public health and the environment.

> Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them.

Id. at 539.

At the same time, Justice Jackson also recognized the equally important power of the state "to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear

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21. *See USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) for flow control valid under contracts; *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) and *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) for flow control valid where procurement is open to out-of-state bidders; *Ben Oehrleins & Son v. Hennepin County*, 113 F.3d 1372 (8th Cir. 1997) for flow control valid when applied to in-state disposal.

adversely on interstate commerce." *Id.* at 532. He saw the distinction between the government's lack of power to retard interstate commerce and its responsibility to protect the public as "deeply rooted in both our history and our law." *Id.* at 532.

Here, the Counties are exercising the power to provide traditional sanitation service to the community. Waste disposal service, like water, sewer, fire and police protection, lies at the foundation of civilized society,[22] and is invaluable to the commercial life of the nation. The Petitioners ask the Court to erase the distinction between public and private service in waste disposal which has been recognized for over 100 years. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). To do so would eliminate the "deeply rooted distinction" recognized by the Court in *HP Hood* and in every subsequent Commerce Clause case.

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22. *See*, generally, Br. of *amicus curiae* Madison County, New York.

CONCLUSION

The flow control laws are an exercise of the police power for the protection of the general health and safety of the people of Oneida and Herkimer Counties. They aid in the provision of essential government service and are applied evenhandedly to all private entities, regardless of their location. There is no violation of the Commerce Clause and the decision below should be affirmed.

Respectfully submitted,

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